#36.300 4/29/75

Memorandum 75-39

Subject: Study 36.300 - Eminent Domain (AB 11 and Related Bills)

The Assembly Judiciary Committee held its first hearing on the eminent domain bills on April 17 and plans to hold another hearing on May 8. We will report orally on their progress at the May meeting.

Exhibit I (green) is a copy of a letter from the County Supervisors Association of California detailing their objections to AB 11; Exhibit II (yellow) is a letter from the Los Angeles County Counsel in support of Exhibit I. All but one of the objections the Commission has already reviewed; some are policy differences with the Commission, others are misreadings or misinterpretations of the statute.

The one new objection is to Section 1250.340 which permits the plaintiff to amend the pleadings upon such terms as the court deems just, including a change in the applicable date of valuation. The Association is concerned that this will allow a change in the valuation date even for a very minor change in the description of the take. The staff agrees that the provision carries this potential, and on further consideration believes that the date of valuation language in the section serves no useful purpose since, in most cases, where the proceeding is not brought to trial within one year, there will be a shift in the date of valuation anyway. See Section 1263.120. Moreover, removal of the date of valuation language will not preclude the court from changing the date of valuation in an appropriate case.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Memorandum 75-39

COUNTY SUPERVISORS
ASSOCIATION
OF CALIFORNIA

EXHIBIT I

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April 14, 1975

The Honorable Alister McAlister
Assemblyman, State of California
Room 3112, State Capitol
Sacramento, Ca 95814

Subject: Assembly Bill 11 and Companion Bills

Dear Assemblyman McAlister:

This letter is in elaboration of my letter of March 21, in which I notified you of the opposition of our Association to Assembly Bill 11 and companion bills, as presently written, which would revise the law of eminent domain in accordance with the recommendations of the California Law Revision Commission.

Our review committee has now concluded its study of this legislation. In stating our major concerns, I will focus on AB 11, the lead bill, although our comments apply to comparable or related provisions in the other bills, particularly AB 278. All chapter and section references are to the proposed revisions of the Code of Civil Procedure set forth in AB 11.

Chapter 3 - The Right to Take

Excess Condemnation

Section 1240.410 permits the property owner to defeat the taking of a "remnant" if he can prove that "the public entity has a reasonable, practicable and economically sound means to prevent the property from becoming a remnant."

In our judgment, this provision invites the property owner to insert himself into the project planning function, opens to speculative inquiry the feasibility of alternate plans, and will instigate delaying litigation and inflate severance damages in many cases.

Condemnation for More Necessary Public Use

Section 1240.640 provides that "where property has been appropriated to public use by the state, the use thereof by the state is a more necessary use than any use to which such property might be put by any other person."

We see no reason why this should be true in all cases, and can imagine situations in which a local use should take precedence over a state use, as, for example, where a county flood control facility must cross a state park area. The degree of necessity of a public use should be determined by the particular circumstances, not by the level of government responsible.

Chapter 5. Commencement of Proceeding

Pleadings

Section 1250.340 would appear to allow a change in the date of valuation of the property even for a very minor change in the description or "take."

Objections to Right to Take (Section 1250.350, et seq.)

These provisions appear to operate as an invitation to litigate, under very general criteria, issues which should be resolved by the public agency's project plans and resolution of necessity. For example, Section 1250.360(d) states that regardless of whether the plaintiff has adopted a resolution of necessity, the defendant may object on the ground that "there is no reasonable probability that the plaintiff will devote the described property to the stated purpose within seven years or such longer period as is reasonable." (Emphasis added.)

Settlement Offers

Section 1250.410 reenacts your AB 3925 (Ch. 1469) last year, permitting a defendant to recover attorney's fees and other "litigation expenses," in a post-trial hearing, if the public agency's offer is found to be unreasonable and the defendant's demand reasonable, "in the light of the compensation awarded in the proceeding." Our objections are as stated last year:

--There is no demonstrated unfairness in condemnation practice to justify this procedure. Under present law, the condemnee may participate in the appraisal process, and is guaranteed full access to the appraiser and his work product.

--The provision is one-sided, allowing the defendant to challenge the reasonableness of the agency's offer, but providing no reciprocal right in the agency to challenge the reasonableness of the condemnee's demand.

--The provision invites the defendant's attorney to gamble on a verdict, thereby reducing the chances for settlement of condemnation actions and encouraging litigation, including a post-trial hearing which may be as lengthy and complex as the trial itself.

--The provision imposes substantial additional costs upon local government, in terms of increased litigation and lengthened procedures, as well as in award of fees. Yet here, as in AB 3925 last year, there is no provision for reimbursement of such costs consistent with the SB 90 tax limit law. (Experience under similar statutes in other states such as Florida and Oregon indicates that award of attorneys fees will raise condemnation costs by approximately one third.)

We point out also that the definition of "litigation expenses" in Section 1235.140, as "reasonable attorneys fees, appraisal fees, and fees for the services of other experts..." appears over-broad and subject to abuse. Moreover, such fees are included "whether...incurred for services rendered before or after the filing of the complaint." Consequently, an award under Section 1250.410 could include fees paid to prevent acquisition of the property, a wide departure from the concept of compensation for the fair market value of the land.

Chapter 6. Possession Prior to Judgment

Deposit of Probable Compensation

The requirement in Section 1255.020 that the notice of deposit be accompanied by a summary appraisal unnecessarily duplicates the requirement for submittal of such appraisal before the action is filed (Govt. Code Sec. 7267.2).

Section 1255.030 establishes a procedure for increase in deposit based upon redetermination of the amount of probable compensation. Significantly, that section does not contemplate a downward redetermination of probable compensation--another example of a seemingly one-sided orientation to revision of eminent domain law. More importantly, the section invites challenge of the deposit and will undoubtedly result in increased preliminary litigation, and corresponding increases in court and agency costs.

Section 1255.230 provides for withdrawal of the deposit even though notice of the application for withdrawal cannot be served upon all parties. Although the public agency is subrogated to the rights of interested parties not served, it is made liable to such defendants. This frustrates the agency's duty to protect public funds and appears clearly inequitable: the risk should be borne by those making claim to the money on deposit.

Section 1255.420 provides that the court may stay an order for possession if possession would result in "substantial hardship" to the defendant or occupant, unless the plaintiff "needs" the property on the date specified, or would incur substantial hardship under a stay. This section subjects the public agency to considerable uncertainty in making property available to a construction contractor, and to costly claims for delay when a stay overruns a contract start date. It may be relatively easy for a defendant to establish "substantial hardship" in giving up a particular piece of property, whatever the time allowed, and quite difficult for the plaintiff to establish "need" for it on a specific date, in advance of the time that the impact of delay on construction may be accurately determined. We see no compelling need for the provision, since the property owner has 90 days within which to relocate after being served with an order for immediate possession, and since the courts have ample authority and opportunity to alleviate any hardship situation in which more time is required.

Chapter 8. Procedures for Determining Right to Take and Compensation

Section 1260.210 removes the burden of proof of compensation from the defendant property owner, providing that neither party shall carry that burden. However, as under existing law, the defendant may present his evidence first and open and close the argument -- advantages associated with the burden of proof. We ask that the burden be left upon the defendant, consistent with the trial advantages he retains, or, if he is to be relieved of the burden, that the plaintiff be given the right to open and close, as it would have in other types of civil actions.

Section 1260.220(b) provides that where there are divided interests in the property to be acquired:

> "The plaintiff may require that the amount of compensation be first determined as between plaintiff and all defendants claiming an interest in the property. Thereafter, in the same proceeding, the trier of fact shall determine the respective rights of the defendants in and to the amount of compensation awarded and shall apportion the award accordingly. Nothing in this subdivision limits the right of a defendant to present during the first stage of the proceeding evidence of the value of, or injury to, his interest in the property..." (Emphasis added.)

The last quoted sentence permits the "stacking" or "pyramiding" of separate interests in the property.

This defeats the purpose of the first stage of the proceeding -- a valuation of the property as a whole, as to all defendants -- and opens the way to inflated individual awards, which will exceed, in total, the value of the property as a whole.

Section 1260.230(c), providing for separate assessment of compensation for loss of goodwill, is seriously objectionable for reasons stated below in the discussion of Chapter 9.

Chapter 9. Compensation

Compensation for Improvements

Section 1263.205 defines "improvements pertaining to the realty" (commonly called "fixtures") to include: "...any facility, machinery, or equipment installed for use on property taken...or on the remainder if such property is part of a larger parcel, that cannot be removed without a substantial economic loss or without substantial damage to the property on which it is installed..." (Emphasis added.) Our objections are as follows:

- --The term "facility" is extremely broad and has not been defined by the courts in eminent domain cases.
- --The term "substantial economic loss" is also vague. Does it mean loss to the property, or loss to the owner, or both?
- --Depending upon interpretation of such terms, the section could require a public agency to pay for an inventory of groceries, drugs, or similar items in a commercial building, or for almost any other personal property

removed from its location because of the condemnation action--whether or not located on the property actually taken.

We strongly urge retention of the present definition of improvements set fofth in Section 1248(b) of the Code of Civil Procedure. In the alternative, Section 1263.205 should be amended to include only those items installed for permanent use upon the property, and to exclude any items placed upon the property for the purpose of sale to the public.

Section 1263.240(c) requires compensation for improvements made after the service of summons if the improvement is authorized by the court after weighing the relative "hardships" involved in permitting or disallowing its placement on the property. We believe this section invites abuse and delaying litigation. The property owner is adequately protected by subsections (a) and (b), requiring compensation for post-summons improvements if required by a public utility or agreed upon by the parties.

Section 1263.250(b) provides compensation for "loss" if the plaintiff obtains a court order precluding the defendant from planting crops after service of summons. "Loss" should be clarified and limited to loss of crops.

Section 1263.260 permits the owner of improvements to remove them, after notice to the plaintiff, and receive compensation for removal and relocation costs. This section, read in light of the vague, expansive definition of improvements in Section 1263.205, could greatly increase litigation expense and costs of acquisition.

Section 1263.270 provides that where an improvement is only partially located on property taken, the court may, on motion, direct the plaintiff to acquire the entire improvement.

We believe that the choice between a partial and total take should be left with the public agency.

Compensation for Injury to Remainder

Section 1263.420 defines damage to the remainder to include damage caused by "the construction and use of the project... whether or not the damage is caused by a portion of the project located on the part taken." (Emphasis added.) This language removes logical and necessary limitations on severance damages in existing law, without provision of alternative

safeguards. Specifically, it allows "proximity damage," from noise, dust, etc., on an open-ended basis both as to time, since damage from "use" of the project may be considered, and as to place, since damage generated off the property taken may be included.

In general, proximity damages to a remainder are shared with the general public and surrounding property owners, and are not peculiar to the condemnee. However, conceding that in some instances such damages should be compensated, they must certainly be subject to reasonable limitations as to source, to prevent speculative awards.

Section 1263.440, concerning computation of damage and benefit to a remainder, appears to introduce needless complexities and speculative elements (such as the timing of construction) into an already complex area of the law.

Compensation for Loss of Goodwill

This is probably the single most disturbing change proposed to present law.

Section 1263.510 provides that the owner of a business on the property taken, or on the remainder, may be compensated for loss of goodwill. Our basic objections are as follows:

--Goodwill is not really an attribute of property or its location, and is not really taken in eminent domain.

--The value of goodwill is, by nature, conjectural, highly uncertain in proof, and highly susceptible to inflation.

--Section 1263.510 lacks guidelines and procedures for the evaluation of goodwill, omitting even a limitation as to the time period for which the loss must be compensated. Most significantly, it fails to authorize examination of the defendant's tax returns, or any other audit of his business. Without access to the defendant's tax records, the plaintiff agency will be at a near-insuperable disadvantage in any goodwill dispute.

--The section will lengthen trial time, increase evidentiary costs, including expert testimony, and inflate awards, all of which increased expense is to be borne by local government without reimbursement under SB 90.

Chapter 10. Divided Interests

Section 1265.310 provides that unexercised options are terminated on the filing of an eminent domain action, but that the option holder is entitled to the value of his option. This is a significant change in existing law, of indefinite application and fiscal impact. How is the value of the option to be determined? May there be testimony as to the option price during the valuation trial? And what happens if the condemnation proceeding is abandoned?

Chapter 11. Postjudgment Procedure

Section 1268.130 provides that at any time after the plaintiff has made a deposit, the court may, upon motion of any defendant, order an increase in the deposit. However, there is no statement of grounds for such motion and order. The purpose of the section should be clarified, so that it is not construed to authorize a court to override a jury verdict on value.

* * *

As indicated at the outset, this letter is not intended as a complete analysis of our problems with AB 11, but rather as a summary statement of our major concerns. We would be pleased to discuss any portion of this legislation with you and your staff, or to document our position with regard to any portion in more detail, should you so desire.

Our overriding concern, as stated in my letter of March 21, 1975, is what we view as a pronounced unbalancing of the law of eminent domain in favor of the property owner, at vastly increased and unreimbursed cost to counties and other public bodies, at a time when they and the taxpayers they represent can ill afford such inflationary changes.

Sincerely,

William L. Berry, Jr.
Legal Counsel

WLB/jn

cc: All Members, Assembly Judiciary Committee

Memorandum 75-39

EXHIBIT IX

JOHN H. LARSON
COUNTY COUNSEL
DONALD K. BYRNE
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April 17, 1975

The Honorable Alister McAlister
Assemblyman, State of California
Room 3112, State Capitol
Sacramento, California 95814

Re: Assembly Bill 11

Dear Assemblyman McAlister:

I am a Principal Deputy County Counsel in the Los Angeles County Counsel's Office, and I am in charge of our Eminent Domain Section. I am concerned about Assembly Bill 11, and I have written letters to the California Law Revision Commission expressing some of my concerns.

William L. Berry, Jr., Legal Counsel for the County Supervisors Association of California, has in his letter to you of April 14, 1975, expressed succinctly and objectively many of the problems raised by Assembly Bill 11. I completely support Mr. Berry's comments and conclusions.

Sincerely,

S. Robert Ambrose
Principal Deputy County Counsel

SRA:jd

cc: William L. Berry, Jr., Esq.
Assemblyman John Miller
Attn: Tom Carroll
William C. George, Esq.
Gerald J. Thompson, Esq.
Arthur Wahlstedt, Esq.